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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff and Respondent,

v.

ARMANDO GOMEZ MARTINEZ,

Defendant and Appellant.

B205248

(Los Angeles County Super. Ct. No. EC044255)

APPEAL from orders of the Superior Court of Los Angeles County, Laura A. Matz, Judge. Affirmed.

Robert B. Amidon for Defendant and Appellant.

Law Office of Jeffrey W. Parks and Glenn E. Gutsche for Plaintiff and Respondent.

Armando Gomez Martinez, doing business as Manny's Transmissions, appeals from the trial court's orders denying his motions for sanctions and attorney fees in the subrogation action filed against him by State Farm Mutual Automobile Insurance Company (State Farm). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On two occasions in 2003 Manny's Transmissions rebuilt the transmission of a Ford F-550 diesel flatbed truck owned and used by Prime Building to haul construction materials. On January 23, 2004, five weeks after the transmission had last been rebuilt, a Prime Building employee loaded the truck and drove to a construction site on Mulholland Drive, a road that winds along the crest of the Hollywood Hills in Los Angeles. The building site was located at the bottom of a steep and narrow driveway adjacent to a newly occupied home. After driving down to the site, the driver was told he could not turn his truck around because there was fresh asphalt. He was directed to back the truck up the hill, so he could turn around on the street and then back the truck down the hill to deposit his load. As the fully loaded truck reached the top of the driveway, a fire erupted under the hood. The truck was a total loss.

Prime Building's insurer, State Farm, took possession of the truck and stored it at a salvage company. Approximately one month later, State Farm retained William Hagerty, a vehicle fire investigator, to determine the cause of the fire. Hagerty inspected the truck and concluded the fire started when the transmission had failed and expelled fluid onto the heated engine. State Farm contacted Martinez, who then inspected the vehicle with Hagerty. According to Martinez, a transmission has a dipstick used for measuring transmission fluid that is held in place by an O-ring and a valve underneath that opens to release fluid when the transmission overheats. The O-ring holding the transmission dipstick in place had melted inside its tube and the "breather" valve was dry, indicating transmission fluid had not been expelled and could not have caused the fire. Martinez said he asked Hagerty to preserve the vehicle.

In a February 2005 letter to Martinez, State Farm's counsel stated the fire had been caused by Martinez's faulty transmission repair and demanded payment of

$28,153.89. Nine months later, the same counsel sent Martinez a draft summons and complaint informing him State Farm would proceed with a lawsuit if the sum was not paid. Seven months later, in June 2006, State Farm's counsel sent a letter to Martinez's former counsel, stating State Farm did not want to incur further storage fees and intended to sell the truck for salvage within 30 days. The letter was intended to give Martinez notice in case he wanted to conduct any further inspection of the truck. State Farm received no response from Martinez.[1] On July 14, 2006 the truck was dismantled, and its parts sold for salvage.

In January 2007 State Farm filed a complaint in subrogation for property damage against Martinez seeking recovery of $36,428.82, the replacement cost of the Prime Building truck, alleging Martinez's negligent repairs had caused the fire. Shortly after the complaint was served, Martinez learned the truck had been dismantled and sold. State Farm later disclosed to Martinez the records relating to the claim had been lost and indicated it was considering dismissing the case. Nonetheless, State Farm filed a first amended complaint on August 15, 2007, again in subrogation seeking recovery of the cost of the truck with causes of action for negligence, breach of warranty and breach of contract.[2]

On September 27, 2007 Martinez demurred to the first amended complaint and served discovery on State Farm. A week later Martinez filed a motion requesting the court to issue terminating sanctions and attorney fees based on State Farm's destruction of evidence.[3] At a hearing on November 9, 2007 the trial court denied the motion for

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[1] Neither Martinez nor his former lawyer has any record of receiving the letter.

[2] Martinez demurred to the initial complaint on May 22, 2007. The hearing on the demurrers, set for June 29, 2007, was taken off calendar at Martinez's request.

[3] Hector Galvan, the owner of Prime Building, testified the records related to maintenance of the truck and the fire had been delivered to State Farm or to Hagerty, but State Farm's counsel had no record of their receipt. State Farm was unable to submit a declaration from Hagerty because, at the time Martinez filed his motion for terminating sanctions, Hagerty had been evacuated from his home during the October 2007 wildfires in northern San Diego County and was unavailable.

sanctions and overruled the demurrers. With respect to Martinez's request for sanctions the court concluded it "cannot find from the showing presented that the circumstances warrant the court ex[erci]sing its inherent authority to impose the drastic sanction of termination. There is insufficient evidence from which the court can conclude that the misconduct in this case was deliberate or egregious such that it has rendered any remedy short of dismissal inadequate to preserve the fairness of the trial. Monetary sanctions are denied. They are unavailable as discovery sanctions since this is not a motion to compel compliance with discovery statutes. No other statute is cited and the court does not have any inherent power to impose monetary sanctions. [Citations.]"

Several days later, on November 14, 2007, State Farm filed a request for dismissal of the case with prejudice. The dismissal was entered the same day by the clerk. Notice of entry of the dismissal was served on November 19, 2007. On November 20, 2007 Martinez filed a memorandum of costs for $1,319.34, which was apparently uncontested.

On December 6, 2007 Martinez filed a motion for attorney fees based on the tort-of-another doctrine recognized in *Prentice v. North American Title Guaranty Corp.* (1963) 59 Cal.2d 618 (*Prentice*) and Code of Civil Procedure section 1021.6, [4] which authorizes an award of attorney fees to the party who prevails on a claim of implied indemnity. The trial court denied the motion on January 16, 2008. Martinez filed a notice of appeal from the November 14, 2007 order of dismissal and the order after judgment regarding attorney fees on January 18, 2008. A separate judgment of dismissal, prepared by counsel for Martinez, was signed by the court and filed on February 13, 2008.

DISCUSSION

1. *The Appealability of the Dismissal and Orders*

Typically, an appeal will not lie from a plaintiff's voluntary dismissal of an action. (*Yancey v. Fink* (1991) 226 Cal.App.3d 1334, 1342-1343; *Gray v. Superior Court* (1997) 52 Cal.App.4th 165, 170; see *Associated Convalescent Enterprises v. Carl Marks & Co.*,

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[4] Statutory references are to the Code of Civil Procedure.

Inc. (1973) 33 Cal.App.3d 116, 120 [voluntary dismissal is a ministerial act, not a judicial act, and thus not appealable].) A voluntary dismissal "terminates the action for all time and affords the appellate court no jurisdiction to review rulings on demurrers or motions made prior to the dismissal." (*Cook v. Stewart McKee & Co.* (1945) 68 Cal.App.2d 758, 760-761.) It "'leaves the defendant as though he had never been a party.' [Citations.] '[I]t is as though no action had ever been filed.'" (*Gray*, at p. 170; see generally 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 144, pp. 218-220.) "Following entry of such dismissal, the trial court is without jurisdiction to act further in the action [citations] except for the limited purpose of awarding costs and statutory attorney's fees." (*Associated Convalescent Enterprises*, at p. 120; *Gutkin v. University of Southern California* (2002) 101 Cal.App.4th 967, 975 [no appeal lies from discovery order entered before plaintiff's voluntary dismissal of action].)[5]

Accordingly, we may not consider any issues arising from Martinez's purported appeal from State Farm's voluntary dismissal of the action or the pre-dismissal motion for terminating sanctions.

2. *The Trial Court Did Not Abuse Its Discretion in Denying Martinez's Motion for an Award of Attorney Fees*

a. *The claim for attorney fees under Prentice*

Under what is known as the American rule, litigants are ordinarily required to bear the cost of their own attorney fees. (See, e.g., *Trope v. Katz* (1995) 11 Cal.4th 274, 278-279 [§ 1021 codifies general American rule requiring each party to bear the litigation cost of its own attorney fees].) In *Prentice*, *supra*, 59 Cal.2d 618 the Supreme Court established a common law exception to this rule in an action involving an escrow holder who had been negligent in closing the sale of property. As a consequence of that

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5 Martinez, the defendant who benefitted from State Farm's dismissal of the action, is not entitled to avail himself of the exception for treating a plaintiff's voluntary dismissal with prejudice as a request for entry of judgment in order to preserve appellate issues. (See, e.g., *Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006, 1012 [stipulation to dismiss to permit appellate review preserves appellate jurisdiction]; *Denney v. Lawrence* (1994) 22 Cal.App.4th 927, 930, fn. 1 [same].)

negligence, the sellers were forced to bring a quiet title action against the purchaser and the holder of a first deed of trust. The sellers secured a judgment of damages against the escrow holder, which included the cost of the quiet title action. Affirming the judgment, the Supreme Court held a "person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred." (*Id.* at p. 620.) As the Court of Appeal explained in *David v. Hermann* (2005) 129 Cal.App.4th 672, 688-689, "Decisions applying *Prentice* recognize that it represents an application of the usual measure of tort damages in circumstances where the defendant's tortious conduct has made it necessary for a plaintiff to incur legal expenses to protect his interests. . . . [¶] . . . '[N]early all of the cases which have applied the [*Prentice*] doctrine involve a clear violation of a traditional tort duty between the tortfeasor who is required to pay the attorney fees and the person seeking compensation for those fees.'"

The *Prentice,* tort-of-another doctrine simply has no application in this case. The only issues in the action between State Farm and Martinez (other than the dispute involving the dismantling of the truck and the loss of documents from the claim file) were whether State Farm could properly act as the subrogee of its insured Prime Building and whether Prime Building's alleged misuse of the truck or Martinez's alleged negligence in repairing the transmission was responsible for the fire that destroyed it. If Prime Building was at fault and not Martinez, then State Farm had no right to recover the sum it paid its insured. But there was no tortious conduct by either Prime Building or State Farm—that is, no breach of duty owed to Martinez—that made it necessary for him to incur the legal fees in this action. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 ["attorney fees incurred as a direct result of another's tort are recoverable damages," citing *Prentice* and *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817-818].)

b. *The claim for attorney fees under section 1021.6*

The Supreme Court sharply limited the scope of its *Prentice* decision in *Davis v. Air Technical Industries, Inc.* (1978) 22 Cal.3d 1. In *Davis,* a products liability case, the Court held an indemnity plaintiff acting in defense of his own wrongdoing may not recover fees incurred in that action. (*Id.* at pp. 4-5.) As the Court cautioned, "the *Prentice* exception was not meant to apply in every case in which one party's wrongdoing causes another to be involved in litigation with a third party. If applied so broadly, the judicial exception would eventually swallow the legislative rule that each party must pay for its own attorney. [Citations.] To avoid this result, *Prentice* limits its authorization of fee shifting to cases involving 'exceptional circumstances.'" (*Id.* at p. 7, fn. omitted.)

In reaction to *Davis* the Legislature enacted section 1021.6, which now governs fee requests in implied indemnity actions. (*See, e.g., Fidelity Mortgage Trustee Service, Inc. v. Ridgegate East Homeowners Assn.* (1994) 27 Cal.App.4th 503, 513 [§ 1021.6 was enacted to overrule *Davis* opinion]; *John Hancock Mutual Life Ins. Co. v. Setser* (1996) 42 Cal.App.4th 1524, 1532.) That statute authorizes a court to "award attorney's fees to a person who prevails on a claim for implied indemnity if the court finds (a) that the indemnitee through the tort of the indemnitor has been required to act in the protection of the indemnitee's interest by bringing an action against or defending an action by a third person . . . ." (§ 1021.6.)[6] "The duty to indemnify for the expenditure of attorney's fees arises out of a duty to provide complete indemnity which *includes* the duty to provide a

[6] Section 1021.6 provides: "Upon motion, a court after reviewing the evidence in the principal case may award attorney's fees to a person who prevails on a claim for implied indemnity if the court finds (a) that the indemnitee through the tort of the indemnitor has been required to act in the protection of the indemnitee's interest by bringing an action against or defending an action by a third person and (b) if that indemnitor was properly notified of the demand to bring the action or provide the defense and did not avail itself of the opportunity to do so, and (c) that the trier of fact determined that the indemnitee was without fault in the principal case which is the basis for the action in indemnity or that the indemnitee had a final judgment entered in his or her favor granting a summary judgment, a nonsuit, or a directed verdict."

defense to another. In such a case the failure to provide a defense gives rise to a duty to recompense for the costs of the defense, which include attorney's fees." (*Watson v. Department of Transportation* (1998) 68 Cal.App.4th 885, 895, fn. 8.)

Nonetheless, "section 1021.6 does not on its face create a right to indemnity. It merely 'permits an indemnitee to recover . . . attorney fees in an implied indemnity action under specified circumstances.'" (*John Hancock Mutual Life Ins. Co. v. Setser*, *supra*, 42 Cal.App.4th at p. 1531, quoting *Bay Development, Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1026.) Accordingly, a party seeking attorney fees under section 1021.6 must plead and prove a right to implied indemnity separate and apart from section 1021.6. (See *Watson v. Department of Transportation*, *supra*, 68 Cal.App.4th at p. 890 ["Section 1021.6 does not establish the criteria for an implied indemnity. It presupposes the existence of 'a claim for implied indemnity' on which the party seeking attorney's fees has prevailed."]; *Lewis v. Purvin* (1989) 208 Cal.App.3d 1208, 1218.)[7]

Martinez appears to fundamentally misunderstand the nature of a claim for implied indemnity; and, as a result, his reliance on section 1021.6 for recovery of attorney fees is misplaced. "In general, indemnity refers to 'the obligation resting on one party to make good a loss or damage another party has incurred.'" (*Prince v. Pacific Gas & Electric Co.* (2009) 45 Cal.4th 1151, 1157.) Implied indemnity—the subject of section 1021.6 and the purported basis for Martinez's claim for attorney fees—although once regarded as distinct, "is now viewed simply as 'a form of equitable indemnity.'" (*Prince*, at p. 1157.) "Historically, this type of indemnity was available when two parties in a contractual relationship were both responsible for injuring a third party; recovery rested

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[7] Ordinarily, a party claiming a right to indemnity may seek to establish that claim by filing a cross-complaint for indemnity in the principal action or by filing a separate complaint for indemnity. (See, e.g., *Uniroyal Chemical Co. v. American Vanguard Corp.* (1988) 203 Cal.App.3d 285, 295 [§ 1021.6 requires either "that the trier of fact . . . determine 'that the indemnitee was without fault in the principal case which is the basis for the action in indemnity' or that 'the indemnitee had a final judgment entered in his or her favor granting a summary judgment, a nonsuit, or a directed verdict'" (italics omitted)].)

on the theory that ‘a contract under which the indemnitor undertook to do work or perform services necessarily implied an obligation to do the work involved in a proper manner and to discharge foreseeable damages resulting from improper performance *absent any participation by the indemnitee in the wrongful act precluding recovery*.’ [Citations.] Now, however, implied contractual indemnity, like traditional equitable indemnity, is subject to comparative equitable apportionment of loss.” (*Id.* at p. 1159.)

The only relevant contract in this case was between Martinez and Prime Building for the repair of the transmission of Prime Building’s truck. But it was Martinez who undertook to do the work, not Prime Building.[8] Thus, if as a result of the truck fire, a third party had sued Prime Building, Prime Building, as indemnitee, would have a potential claim for implied contractual indemnity against Martinez, as indemnitor, for foreseeable damages resulting from Martinez’s allegedly improper performance of the transmission repair. Prime Building, on the other hand, had no obligation to perform services on behalf of Martinez from which a duty to indemnify could be implied. The fact that Martinez made an unsupported demand on Prime Building to provide him with a defense to State Farm’s subrogation action does not transform Martinez from indemnitor to indemnitee. Simply put, Martinez’s claim under section 1021.6 is entirely without merit.

DISPOSITION

Martinez’s appeal from State Farm’s voluntary dismissal of the complaint and the court’s order denying sanctions is dismissed. The order of the trial court denying Martinez’s motion for attorney fees is affirmed. State Farm is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.

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[8] Certainly the insurance contract between Prime Building and State Farm does not create any implied right to indemnity in favor of Martinez.